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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Plaintiff,

ELODIA SANCHEZ

Plaintiff-Intervenor,

v.

EVANS FRUIT CO., INC.

No. CV-10-3033-LRS

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF JOINT
MOTION TO QUASH
SUBPOENAS FOR MID
VALLEY COMMUNITY
CLINIC AND SUNNYSIDE
COMMUNITY HOSPITAL
PURSUANT TO FED. R. CIV. P.
45(c)

1
2 Defendant, and
3 JUAN MARIN AND ANGELITA
MARIN, a marital community,
4 Defendant-Intervenor.

5
6 **I. INTRODUCTION**

7 Plaintiffs respectfully move the court pursuant to Fed. R. Civ. P.
8 45(c)(3)(A)(iii) for an order quashing subpoenas requiring Mid Valley Community
9 Clinic and Sunnyside Community Hospital to produce all records in their
10 possession, custody, and control relating to Class Members Esmeralda Aviles,
11 Vanessa Aviles, Carina Gutierrez, and Veronica Reyna between January 1, 2005
12 and the present. Plaintiff Equal Employment Opportunity Commission moves the
13 court for an order quashing on behalf of all four Class Members. Northwest Justice
14 Project joins on behalf of Class Members Esmeralda Aviles and Vanessa Aviles.

15 **II. STATEMENT OF FACTS**

16 Class Members Esmeralda Aviles, Vanessa Aviles, Carina Gutierrez, and
17 Veronica Reyna ("Class Members") seek compensation from Defendant Evans
18 Fruit Co., Inc. ("Evans Fruit") for emotional distress damages they suffered as a
19 result of being sexually harassed while in Evans Fruit's employ. On December 9,
20 2011, Evans Fruit served subpoenas on Mid Valley Community Clinic and
21 Sunnyside Community Hospital ("Clinics"), demanding that the Clinics produce

1 all their records from nearly the last six years that relate to the Class Members.

2 **III. DISCUSSION**

3 Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, “[p]arties may
4 obtain discovery regarding any nonprivileged matter that is relevant to any party's
5 claim or defense...” Fed. R. Civ. P. 26(b)(1). Accordingly, the court must quash or
6 modify a subpoena that requires disclosure of privileged or other protected matter,
7 if no exception or waiver applies. Fed. R. Civ. P. 45(c)(3)(A)(iii). Because the only
8 relevant records sought by these subpoenas are protected by the psychotherapist-
9 patient privilege, the court should grant Plaintiffs’ motion to quash the subpoena.

10 **A. The Class Members’ Records, Other Than Psychological Records, Are** 11 **Not Discoverable Because They Are Not Relevant to Any Party’s Claim** **or Defense.**

12 As a preliminary matter, the court should distinguish between
13 “psychological records,” which involve the Class Members’ mental health
14 (including physical conditions related thereto) and all other records. In *Fitzgerald*
15 *v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003), the court held that where, as here, a
16 plaintiff seeks compensation for so-called “garden-variety” emotional distress,¹

17
18 ¹ A plaintiff alleges “garden variety” emotional distress damages when she asserts
19 that a defendant’s bad conduct caused her emotional upset and related symptoms,
20 but does not assert that the conduct caused specific medical conditions. *See, e.g.,*
21 *Fitzgerald v. Casill*, 216 F.R.D. 632, 634 (N.D. Cal. 2003) (denying motion to
compel production of medical records where plaintiff alleged emotional distress
damages such as “anger/irritability, discouragement, nervousness, sleep loss,

1 psychological records are discoverable unless a privilege applies, while other
2 records are irrelevant and thus undiscoverable. Psychological records may be
3 relevant “in determining...causation (i.e., whether there were other unrelated
4 sources for [Plaintiff’s] emotional distress) or the magnitude of the alleged
5 distress.” *Fitzgerald*, 216 F.R.D. at 634. Records other than psychological records
6 are not relevant because the Class Members have not made any claim for physical
7 injury other than that directly tied to emotional distress, and so have not put their
8 physical condition at issue. *See id.*, accord *Simpson v. Univ. of Colorado*, 220
9 F.R.D. 354, 365 (D.Colo. 2004) (in Title IX sexual harassment case that alleged no
10 physical injury, medical records that did not specifically reference or describe
11 plaintiff’s emotional or psychological condition not relevant).

12 Accordingly, records other than psychological records are not discoverable.

13 **B. The Class Members’ Psychological Records, If Any, Are Not**
14 **Discoverable Because They Are Protected by the Psychoanalyst-Patient**
15 **Privilege.**

16 As noted above, even relevant evidence is not discoverable if it falls under
17 an evidentiary privilege. Fed. R. Civ. P. 26(b)(1). Because the Class Members’

18 relived experience, and arguing with his partner.”) The fact that compensation for
19 such emotional distress damages may be great does not prevent them from being
20 considered “garden variety.” *See EEOC v. Wal-Mart Stores, Inc.*, ---F.R.D.---,
21 2011 WL 5505398, *2-3 (E.D. Wash. 2011) (EEOC sought emotional distress
damages “to the extent fully allowable under the law,” or \$300,000; the court
found that such damages could be — and in fact were — nonetheless “garden
variety,” rejecting defendant’s contention to the contrary).

1 psychological records, if any, are protected by the psychoanalyst-patient privilege,
2 they are not discoverable.

3 1. The psychoanalyst-patient privilege recognized in *Jaffee v. Redmond*
4 applies to the Class Members' psychological records.

5 In federal question cases where a plaintiff raises pendent state claims, and
6 the information sought is relevant to both the state and federal claims, the federal
7 common law of privileges will govern. *Perrignon v. Bergen Brunswig Corp.*, 77
8 F.R.D. 455, 459 (N.D. Cal. 1978); *see also Tubar v. Clift*, 2007 WL 30872, *3 n. 1
9 (W.D. Wash. 2007). The U.S. Supreme Court formally recognized the
10 psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996), holding
11 that “[c]onfidential communications between a licensed psychotherapist and her
12 patients in the course of diagnosis or treatment are protected from compelled
13 disclosure[.]” *Jaffee*, 518 U.S. 1 at 15. Thus, any such communications made by
14 the Class Members fall within the privilege and are not subject to discovery.

15 2. The Class Members have not waived the privilege because there are
16 no issues of multiple causation in their cases.

17 a. “Broad” and “Narrow” Approaches to Waiver

18 The Supreme Court in *Jaffee* stated that a patient may waive the
19 psychotherapist-patient privilege, *Jaffee*, 518 U.S. at 15, n. 4, but neither that court
20 nor the Ninth Circuit has addressed whether a plaintiff waives the privilege by
21 claiming emotional distress damages.

1 District Courts within the Ninth Circuit apply either a “broad approach” or a
2 “narrow approach” to waiver. Courts taking the narrow approach have found that
3 where, as here, a plaintiff alleges only “garden variety” emotional distress damages
4 (*i.e.*, where plaintiffs do not assert that defendants’ discrimination caused any
5 specific mental or medical conditions), without relying on medical records or
6 medical expert testimony for proof at trial, the psychotherapist-patient privilege is
7 not waived. *See, e.g., Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003); *see*
8 *also Sims v. Lakeside School*, 2007 WL 5417731, at *1 (W.D. Wash. March 15,
9 2007; *EEOC v. Wyndham Worldwide Corp.*, 2008 WL 4527974, at *6 (W.D.
10 Wash. Oct 03, 2008). By contrast, under the “broad approach,” courts have held
11 that a simple allegation of emotional distress constitutes waiver. *See, e.g., Doe v.*
12 *City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999); *see also Uzzell v. Teletech*
13 *Holdings, Inc.*, 2007 WL 4358315, at *2 (W.D. Wash. Dec.7, 2007).

14 b. *Because the Class Members’ cases present no “multiple*
15 *causation” issues, the court should apply the narrow*
approach to waiver.

16 District Courts in the Ninth Circuit appear to determine whether to apply the
17 narrow or broad approach to waiver on a case-by-case basis. Two recent cases
18 support the application of the narrow approach in the case of the Class Members.

19 In *EEOC v. California Psychiatric Transitions*, 258 F.R.D. 391 (E.D. Cal.
20 2009), the court applied the broad approach and required a plaintiff asserting

1 sexual harassment and retaliation claims under Title VII to produce her medical
2 records where (1) the only remedy the EEOC was seeking on behalf of the plaintiff
3 was emotional distress damages resulting from the alleged harassment and (2) the
4 plaintiff was being treated for her diagnosed clinical depression, suggesting a
5 possible “multiple causation” issue. *California Psychiatric Transitions*, 258 F.R.D.
6 at 400 (“The emotional distress [Plaintiff] allegedly suffered as a result of the
7 sexual harassment could have been affected by her depression and vice versa.”).

8 Just this year, the Eastern District of Washington applied the narrow
9 approach to waiver in a case where, as in *California Psychiatric Transitions*, the
10 only compensatory damages sought by the EEOC on the claimant’s behalf were for
11 emotional distress; the plaintiff’s employer refused his religiously-motivated
12 request for a scheduling accommodation so that he would not have to work on
13 Sunday. *See EEOC v. Wal-Mart Stores, Inc.*, --- F.R.D. ----, 2011 WL 5505398, *1
14 (E.D. Wash. 2011). The court distinguished *California Psychiatric Transitions*
15 because, in that case, “[the] plaintiff claiming Title VII discrimination was also
16 being treated for depression, so multiple causation was clearly an issue...” *Wal-*
17 *Mart Stores*, 2011 WL 5505398, *3. Finding no such “multiple causation” issues in
18 the case before it, the court went on to apply the narrow approach to waiver. *Id.*

19 The Class Members’ cases likewise present no multiple causation issues.
20 They have not been diagnosed with or sought treatment for any physical or

1 psychological conditions that might have affected the emotional distress they
2 suffered as a result of Defendants' bad conduct. Accordingly, the court should
3 apply the narrow approach to waiver.

4 c. *Applying the narrow approach, the court should find that the*
5 *Class Members have not waived the privilege by any other act*
and that their psychological records are thus privileged.

6 The Class Members seek compensation for the "garden variety" emotional
7 distress they suffered as a result of Defendants' bad conduct. They intend to prove
8 those damages through evidence other than medical records or expert testimony.
9 Furthermore, they will not affirmatively rely on any privileged communications in
10 proving their emotional distress damages. The narrow approach to waiver holds
11 that, in such circumstances, a plaintiff's psychological records are protected by the
12 psychotherapist-patient privilege and are thus not discoverable. *EEOC v. Wal-Mart*
13 *Stores, Inc.*, ---F.R.D.---, 2011 WL 5505398, *3 (E.D. Wash 2011). Thus, the
14 court should grant the instant motion.

15 3. Application of the psychotherapist-patient privilege will not cause
16 Defendants undue prejudice.

17 "The defendant has numerous avenues through which it can make its case
18 without delving into the plaintiffs' confidential communications." *Fitzgerald v.*
19 *Cassil*, 216 F.R.D. 632, 638 (N.D. Cal. 2003). Defendants can cross-examine the
20 Class Members about other contributing factors or stressors that may have affected
21 their emotional state; they can examine percipient witnesses; or they may elicit that

1 the plaintiff did not seek therapy or treatment. *See id.* at 638. Furthermore,

2 If, in the course of deposing [Plaintiff], family members, or co-
3 workers, Defendant discovers that there are more particularized
4 mental health or other physical health issues, or that there were other
5 potential causes or a long history of a relevant mental or physical
6 illness, then Defendant may reapply to the Court for an order
7 compelling production of medical records with proof of that
8 additional information.

9 *EEOC v. Wal-Mart Stores, Inc.*, ---F.R.D.---, 2011 WL 5505398, *3 (E.D. Wash.
10 2011).

11 IV. CONCLUSION

12 Defendants' subpoenas of the Clinics demand production of all records from
13 the last six years, medical and otherwise, related to the Class Members. However,
14 records other than psychological records are irrelevant to the Class Members'
15 claims of emotional distress damages. Furthermore, any psychological records are
16 protected by the psychotherapist-patient privilege. Because the Class Members'
17 cases present no multiple causation issues, the court should apply the "narrow"
18 approach to waiver of that privilege. Given that the Class Members have asserted
19 only "garden variety" emotional distress damages and have done nothing to waive
20 the privilege. Moreover, a finding of privilege will not unduly prejudice
21 Defendants in making their case. Accordingly, the court should find that the Class
Members' records are privileged and grant the instant motion.

DATED this 21st day of December, 2011.

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CERTIFICATE OF SERVICE

I Alex Galarza hereby certify that on this 21st day of December 2011,
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